In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 654

ROBERT E. RUTHERFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10–19) is reported at 365 F. 2d 353. The district court's orders (Pet. App 1–9) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1966. On September 27, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 10, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

288-774—66——1

QUESTIONS PRESENTED

1. Whether the provisions of the Antitrust Immunity Statute are applicable to a civil suit by the United States under Section 4A of the Clayton Act to recover damages in respect of conduct forbidden by the antitrust laws.

2. Whether the Antitrust Immunity Statute is valid under the Fifth Amendment.

STATUTES INVOLVED

The Antitrust Immunity Statute, 15 U.S.C. 32, provides as follows:

> No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1–7 of this title [Sherman Act] and all Acts amendatory thereof or supplemental thereto * * *: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

The original language of the statute (32 Stat. 903–904), along with Section 4A of the Clayton Act, 69 Stat. 282, 15 U.S.C. 15a, are set forth on pages 3–4 of the petition for certiorari.

STATEMENT

During a deposition in an action for damages by the United States under Section 4A of the Clayton Act and the False Claims Act (R.S. 3491, 3492, 31 U.S.C. 232, 233), petitioner refused to answer ques-

tions after being ordered by the court to do so, and was sentenced to imprisonment for contempt.

The suit was against Carnation Company of Washington and Inland Empire Dairy Association and sought recovery of damages suffered by the government as a result of rigged bidding in the sale of milk and dairy products to the United States. Earlier, in 1962, Carnation, Inland and an Inland officer had been indicted under the Sherman Act (15 U.S.C. 1) for conspiring to fix prices on sales of milk and milk products to Fairchild Air Force Base in Washington, and petitioner, an officer of Carnation, had testified before the grand jury that returned the indictment and had obtained immunity as provided by the Antitrust Immunity Statute. The defendants in the criminal proceeding pleaded *nolo contendere* and were fined (Pet. App. 10). This civil suit followed. The complaint contained counts under both Section 4A of the Clayton Act and the False Claims Act (Pet. App. 11). The antitrust count charged a conspiracy to fix prices and to submit noncompetitive, collusive and rigged bids on milk and milk products in violation of Section 1 of the Sherman Act (Pet. App. 17). The False Claims Act count charged that defendants had falsely represented that they were competitive bidders. Both counts arose from the same conduct.

On November 17, 1964, petitioner was subpoenaed by the government for a pre-trial deposition. Claiming the Fifth Amendment's privilege against self-incrimination, he refused to answer certain questions even though government counsel assured him that he had statutory immunity. The government moved the

district court under F.R. Civ. P. 37(a) to order him to answer. The court denied the motion on the ground that the Antitrust Immunity Statute was inapplicable since one count of the complaint was under the False Claims Act. After the court of appeals for the circuit said in *Kronick* v. *United States,* 343 F. 2d 436 (C.A. 9), that the immunity statute applied to civil damage actions in which alternative counts are stated under the Clayton Act and a false claims statute, so long as the proof required to sustain both claims is substantially identical, the government asked the district court to reconsider; and, in the light of the court of appeals' ruling, the district court reversed itself and held that the statutory immunity applied and would afford petitioner protection from prosecution for all past crimes revealed by his deposition.

On June 23, 1965, the deposition was resumed before the district court, but petitioner persisted in his refusal to answer questions on the ground that his answers might tend to incriminate him. The court read the immunity statute to petitioner, explained to him that he would be immune from prosecution by reason of the statute, and ordered him to answer. Petitioner refused to obey the court's order. The court certified that it had seen and heard, in its presence, petitioner's contemptuous conduct, and it sentenced him to imprisonment for a term of ninety days. Execution of judgment was suspended, however, for a period of sixty days following affirmance of the order on appeal in order to afford petitioner an oppor-

tunity to purge himself of his contempt (Pet. App. 7–9).

The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 10–19). It held that the Antitrust Immunity Statute is applicable in a civil damage suit by the United States under Section 4A of the Clayton Act (Pet. App. 14) because such damage actions are "proceedings" or "suits" to enforce the antitrust laws within the meaning of the immunity statute; and that the inclusion of an alternative claim for relief under the false Claims Act did not render the immunity statute inapplicable, where, as here, the claims were based upon the same conduct and the proof required to establish them would be substantially identical. It held specifically that petitioner's immunity would cover "any past crimes including those subsequent to the grand jury proceeding which may be disclosed by his testimony" (Pet. App. 19). Finally, citing *Ullmann* v. *United States*, 350 U.S. 422, the court held that the immunity statute does not contravene the Fifth Amendment.

ARGUMENT

1. The Antitrust Immunity Statute grants immunity to a witness testifying in any proceeding under the Sherman Act "and all Acts amendatory thereof or supplemental thereto" (15 U.S.C. 32). Petitioner refused to testify in a proceeding under Section 4A of the Clayton Act. We believe that Section 4A is plainly supplemental to the Sherman Act, most clearly where, as here, the basis of the Section 4A action is a violation of the Sherman Act. In such

a case Section 4A operates simply to give the government a damages remedy for Sherman Act violations.[1] How more plainly to supplement the Sherman Act than by providing an additional remedy for its enforcement?[2]

2. Petitioner misconstrues the court of appeals' decision when he suggests (Pet. 8–9) that it has extended the immunity statute to damages actions instituted by private litigants. The only issue decided by the court of appeals was, in its words: "Does the immunity statute apply in a civil damage action instituted by the Government" (Pet. App. 14). The court of appeals did not decide that the immunity statute applies to private suits. The original language of the statute (32 Stat. 903; Pet. 3) appears to confine immunity to testimony given in suits by the government. *H. Wagner & Adler Co.* v. *Mali*, 74 F. 2d 666, 670 (C.A. 2). But that issue was not decided below and clearly need not be reached here.

3. Petitioner's contention that he enjoys only partial immunity is unfounded. He evidently fears that he will not have immunity so far as testimony with respect to the False Claims Act phase of the case is concerned. But the court of appeals has expressly

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[1] In *United States* v. *Cooper Corp.*, 312 U.S. 600, this Court held that the United States was not authorized to sue under the Sherman Act for damages to itself. Section 4A provided such authority. See H. Rep. No. 422, 84th Cong., 1st Sess.; S. Rep. No. 619, 84th Cong., 1st Sess.

[2] The legislative history shows that Congress explicitly regarded Section 4A as an additional weapon for enforcing the antitrust laws, especially Section 1 of the Sherman Act. See S. Rep. No. 619, *supra*; H. Rep. No. 422, *supra*, pp. 2–5.

ruled that petitioner will enjoy immunity as to all testimony he may give in this case (Pet. 17–18), in view of the substantial identity in the proof necessary to establish the antitrust and the false-claims counts. See *Kronick* v. *United States*, 343 F. 2d 436, 441 (C.A. 9). *H. Wagner & Adler Co.* v. *Mali*, *supra*, is not opposed. It was not a case involving dual claims based upon the same conduct, in a suit brought by the United States. Its holding—that the Antitrust Immunity Statute does not apply to testimony in private damages actions to enforce the antitrust laws—is inapposite.

4. Finally, there is no occasion to examine further the constitutionality of the immunity statutes. The validity of such statutes under the Fifth Amendment was upheld by this Court 70 years ago (*Brown* v. *Walker*, 161 U.S. 591), and reaffirmed after full consideration as recently as 10 years ago (*Ullmann* v. *United States*, 350 U.S. 422). Neither *Miranda* v. *Arizona*, 384 U.S. 436, nor *Tehan* v. *Shott*, 382 U.S. 406, casts doubt upon the constitutionality of immunity statutes. *Tehan* was concerned only with retrospective application of this court's decision in *Griffin* v. *California*, 380 U.S. 609, that adverse comment on a defendant's failure to testify in a State prosecution violates the privilege against self-incrimination, and *Miranda* was concerned with standards for protection of the privilege against self-incrimination when prosecuting authorities obtain statements from suspects under arrest.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

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1. The Government Has Erroneously Asserted That the Antitrust Immunity Statute Covers All Testimony in All Proceedings Under the Antitrust Laws.

The Government's assertion in Paragraph 1 of its Argument (Bf. 5) appears to be based upon the Government's reading of 15 U.S.C. § 32. The Government relies upon the wrong statute. Section 32 is not the Antitrust Immunity Statute; Section 32 is merely the codifier's paraphrase of the Antitrust Immunity Statute. (See Footnote 4 of this Court's opinion in *United States v. Welden* (1964), 377 U.S. 95, 98, 152 L. Ed. 2d 152, 157.) The Antitrust Immunity Statute which Congress enacted in 1903 is found at 32 Stat. 903-04. (Pet. 3.) The courts have always looked to the full text of 32 Stat. 903-04 in order to determine whether particular testimony is covered by the Immunity Stat-